



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 13, 1997

Ms. Doreen McGookey
Assistant City Attorney
City of Dallas
501 Police and Courts Building
Dallas, Texas 75201

OR97-0343

Dear Ms. McGookey:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 103820.

The Dallas Police Department (the "department") received a request for information relating to the investigation of the April 22, 1987 assault on Peggy Railey, including any parts of the investigation focusing on suspect Walker Railey as well as any other suspects. You assert that portions of the requested information are confidential under section 552.101 of the Government Code, in conjunction with section 5.08(b) of article 4495b of the Texas Revised Civil Statutes, section 611.002 of the Texas Health and Safety Code, article 4413(29cc) of the Texas Revised Civil Statutes, sections 411.083, 414.008 and 414.009 of the Government Code, rule 6 of the Federal Rules of Criminal Procedure, article 20.02 of the Texas Code of Criminal Procedure, and common law privacy. We have considered your arguments and have reviewed the records at issue.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The documents submitted to this office which are contained in "Exhibit 1" include medical records, access to which is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical records submitted to this office for review may only be released as provided by the MPA.

However, not all the documents in Exhibit 1 were created or maintained by a physician. Our review of these records indicates that they may contain information protected by common law privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. We conclude the information in Exhibit 1 which you marked and which was not created or maintained by a physician contains highly intimate and embarrassing information and may be withheld under section 552.101.¹ The information relating to fingerprints, which we have marked with a green tag, is not considered intimate and embarrassing and must be released.

You next contend certain information contained in "Exhibit 2" is confidential pursuant to section 611.002 of the Texas Health and Safety Code. Section 611.002 of the Health and Safety Code provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.²

....

(d) A person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information....

The records contained in Exhibit 2 fall within the scope of section 611.002(a) and (d) and therefore are excepted from public disclosure pursuant to section 552.101 of the Government Code, with the following exceptions. The department must release the pamphlet related to certain professional services, which we have marked with a green tag, and, of the information which you have highlighted, the document containing the notation describing certain prescription drugs, which we have also marked with a green tag. The information in Exhibit 2 marked by the department as excepted by common law privacy must also be withheld under section 552.101.

Exhibit 3 contains information which discusses polygraph interviews and examinations.

¹Because the Act prohibits the release of confidential information and because its improper release constitutes a misdemeanor, the attorney general will raise section 552.101 on behalf of a governmental body, although the attorney general ordinarily will not raise other exceptions that a governmental body has failed to claim. *See* Open Records Decision Nos. 455 (1987) at 3, 325 (1982) at 1.

²Section 611.001 of the Health and Safety Code defines "professional" in part as "a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder."

Article 4413(29cc), V.T.C.S., excepts from required public disclosure information relevant to a polygraph examination. V.T.C.S. article 4413(29cc), section 19A provides in pertinent part:

(b) Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

Subsection (d), which specifies persons to whom information acquired from a polygraph examination may be disclosed, is not applicable to this request. Accordingly, the department must withhold the polygraph examination and any information acquired from the examination, including that which you have marked, under section 552.101 of the Government Code in conjunction with V.T.C.S. article 4413(29cc), section 19A(b).

Exhibit 4 contains information you assert is confidential under common-law privacy, article 4495b of Vernon's Texas Civil Statutes, and section 611.002 of the Texas Health and Safety Code. With the exception of two documents we have marked with a green tag, we conclude that the information marked by the department as confidential may be withheld under section 552.101 as it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities. In addition, we have identified certain information in Exhibit 4 not marked by the department which is protected by common-law privacy, and which must be withheld from disclosure. We have marked this information with red tags.

With regard to the information submitted which relates to attempted suicide, we note that in *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Industrial Foundation*, 540 S.W.2d at 683. The Court went on to state, however, that:

[o]nce information is made a matter of public record, the protection accorded freedom of speech and press by the First Amendment may prohibit recovery for injuries caused by any further disclosure of and publicity given to such information, at least if the information is at all newsworthy.

Industrial Foundation, 540 S.W.2d at 684. You inform us that Walker Railey's attempted suicide has been published in the newspaper. Therefore, assuming this fact was so published, we conclude that references in the submitted information to Mr. Railey's attempted suicide are a matter of public record and may not be withheld from disclosure. We have no information, however, that the contents of Mr. Railey's suicide note have been similarly published. We therefore conclude the contents of the suicide note are intimate and embarrassing information which is of no legitimate concern to the public and must be withheld from disclosure under

552.101.³

Exhibit 5 consists of information received by the department under the crimestoppers program. Section 414.009 of the Government Code provides in pertinent part:

(a) A person who . . . accepts a report of criminal activity on behalf of a local crime stoppers program commits an offense if the person intentionally or knowingly divulges to a person not employed by a law enforcement agency the content of a report of a criminal act or the identity of the person who made the report without the consent of the person who made the report.

On the basis of this provision of the Government Code, we conclude the information marked by the department in Exhibit 5 may be withheld from disclosure under section 552.101.

You next contend information contained in Exhibit 6 is confidential under section 411.083 of the Government Code, which protects from disclosure criminal history documents that are maintained by the Texas Department of Public Safety. You state that "[s]ince these documents were received from the Texas Department of Public Safety, such information is confidential by law and protected from disclosure pursuant to Section 552.101 of the Texas Government Code." The Government Code at section 411.082(2) defines "criminal history record information" as

information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal charges and their dispositions. The term does not include: (A) identification information, including fingerprint records, to the extent that the identification information does not indicate involvement of the person in the criminal justice system; or (B) driving record information maintained by the department under Section 21, Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes).

Because the information contained in Exhibit 6 appears to be driving record information, and does not appear to indicate involvement of the subject of the records in the criminal justice system, we conclude that this information may not be withheld under section 552.101.

Finally, you state that the investigative file contains information regarding the deliberations of a grand jury, a list of witnesses appearing before a grand jury, and subpoenas issued by a grand jury. In Open Records Decision No. 513 (1988), we ruled that the Open Records Act does not apply to information within the actual or constructive possession of the grand jury. *Id.* at 3. A district attorney who receives a request for grand jury records is instructed not to submit those records to this office for review, but rather to submit to us an

³We are aware that Walker Railey was tried in court for attempted murder. Records filed with a court are public documents and must be released unless there is a statutory basis for withholding them from disclosure. See *Star Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992). Thus, any information contained in the documents submitted to this office which were made a part of the public record in that proceeding are now public information and must be released.

affidavit to the effect that the information was prepared or collected at the express direction of the grand jury. *Id.* at 4-5. You have submitted to us an affidavit that establishes that some of the requested records are grand jury records. Therefore, we conclude that those records are not subject to required public disclosure under the Open Records Act.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 103820

Enclosures: Marked documents

cc: Ms. Teri Mitchell
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